No. 2928

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

F. T. MEYER,
PLAINTIFF IN ERROR

vs.

THE PACIFIC MACHINERY COMPANY,
a Corporation,
DEFENDANT IN ERROR

Brief on Behalf of Defendant in Error

UPON WRIT OF ERROR
TO THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF OREGON

DOLPH, MALLORY, SIMON & GEARIN
HALL S LUSK and
C. D. LATOURETTE,
Mohawk Building, Portland, Oregon,
Attorneys for Plaintiff in Error.

BRONSON, ROBINSON & JONES,
Coleman Building, Seattle, Washington,
Attorneys for Defendant in Error.

Gateway Printing Company, 500 Collins Bldg., Seattle

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Upon Writ Error to the District Court of the United States for the District of Oregon.

STATEMENT OF THE CASE

The defendant in error is wholly dissatisfied with the recital by the plaintiff in error of the pleadings in lieu of a statement of the facts in the case, and craves the indulgence of the court for the following brief recital:

The defendant in error, a Washington corporation, in response to invitations sent out by the Oregon City Lumber & Manufacturing Company, (which we shall designate The Lumber Company) on April 29, 1909, submitted to the Lumber Company the following proposal in writing:

Portland, Oregon, April 29, 1909.

Oregon City Lumber & Mfrg. Co.,
Oregon City, Ore.

Gentlemen: We propose to furnish you machinery in accordance with attached specifications for the sum of $4,695.00, including a 11x14 Beck type engine feed, which is not mentioned in the specifications, delivery to be made at Portland. Terms to be $1,500.00 cash on arrival of the machinery, balance to be paid in equal payments of two, three, four and five months dating from shipment of machinery. *Transaction to be covered by machinery contract, with notes on deferrred payments,* bearing interest at 8%, notes to be endorsed by the company as well as by your Mr. Bohn and Mr. Collins, personally.

Yours truly,
PACIFIC MACHINERY COMPANY,
Thos. Garrett, Mgr.

Accepted:
Oregon City Lumber & Mfg. Co.,
By Wm. G. Bohn, Pres.
Geo. W. Collins.

(Plff's. Exhibit "A" Transcript p. 34.)

Attached to such proposal were the specifications therein referred to. The proposal was accepted by Mr. Bohn and Mr. Collins on behalf of the Lumber Company, and in pursuance thereof, continuing at intervals for a term not definitely shown in the record, the defendant in error shipped to the Lumber Company, various items of machinery named in said specifications (See evidence of Thos. S. Garrett, pages 36, 37, 38 and 39, and plaintiff's Ex. "A," page 34 of Transcript). The mill operated by the Lumber Company was leased by it, and on receipt of the machinery it was attached by bolts to the supports in such a manner that it could be detached by merely unscrewing the nuts from the bolts without injury to the machinery or the mill frame. (See evidence of Thos. S. Garrett, p. 43-44 of the Transcript, and the evidence of Edward I. Garrett, p. 100-101 of the Transcript, evidence of D. C. Latourette, p. 109 of the Transcript). During the time while this machinery was being furnished, to-wit, about July 22, 1909, the defendant in error presented to the Lumber Company its regular form of conditional sales contract, (being defendant's Ex. No. 4, p. 142 of the Transcript) for execution and delivery to the defendant in error, and also requested the payment of the cash and the execution of the notes, as provided for in plaintiff's Ex. "A." The Mill Company neither paid the cash nor executed the notes nor signed the machinery contract.

(See evidence of Wm. G. Bohn, pp. 77, 79 and 84 of the Transcript.)

On October 28, 1909, the Lumber Company, which, from the record, we think we may safely assume, was, during all times after July 22nd, in failing circumstances, made a general assignment of its property to John J. Cook and J. W. Moffit, for the benefit of its creditors.

Thereafter, a reorganization was proposed by Geo. W. Bohn in which the defendant in error agreed, conditionally, to participate with the other creditors, among whom was the First National Bank of Oregon City, holder of a chattel mortgage on the mill belonging to the Lumber Company, to which this machinery was attached. Of this bank, the plaintiff in error was, and is, the cashier, and of which bank he is the representative in this litigation (see evidence of F. T. Meyer, pp. 114 and 115 of the Transcript). In connection with this proposed reorganization, on November 13,1909, the attorney for the defendant in error, in response to the request that it cooperate therein, signed such reorganization agreement (see Transcript p. 137 defendant's Ex. No. 2) and transmitted the same with a letter to said George W. Bohn, qualifying its participation in such reorganizatiion, which agreement came into the hands of the plaintiff in error and was produced by him at the trial. In the letter accompanying such agree-

ment was recited in plain language the fact that the plaintiff in error claimed that it was entitled to and should have had a conditioinal sale contract, but that it was not felt to be necessary that litigation be started at that time, and that the plaintiff in error was willing to give the Lumber Company every opportunity to get on its feet (see plaintiff's Ex. "B," p. 67 of the Transcript). This reorganization plan fell through, and in the spring of 1911, the assignees of the defunct corporatiion advertised for sealed bids for the machinery furnished by the plaintiff in error and described in Ex. "A," and which is the subject matter of this action, together with other machinery in the mill leased by the Lumber Company, and covered by the chattel mortgage to the First National Bank of Oregon City. On April 20, 1911, the assignees received from the plaintiff in error a letter in the form of a bid for the machinery in question, and made a bill of sale of this machinery to the plaintiff in error (see testimony of C. D. Latourette, p. 122 of the Transcript). On the day of the sale the defendant in error, through its president, Mr. E. I. Garrett, accompanied by its attorney, appeared at the place of sale and had considerable conversation with Mr. D. C. Latourette, who, with Mr. C. D. Latourette, seems practically to constitute the First National Bank of Oregon City. It is very positively testified to by E. I. Garrett and Mr. Bronson, attorney for the company, that they informed Mr.

D. C. Latourette, who was representing the bank in this matter, of the purpose of their visit, and of their interest in the property which the assignees of the defunct corporation were proposing to sell under the direction of Mr. C. D. Latourette, as their attorney (see evidence of Edward I. Garrett, pp. 99-100 of the Transcript, and evidence of Ira Bronson, p. 57 of the Transcript). It is true that Mr. D. C. Latourette, at the time of the trial, testified that, to the best of his recollection, nothing was said about the conditional sale rights of the defendant in error, although no explanation was made by him as to why Mr. Garrett should have been attending and conferring with him on the day of the sale unless he had some right or title in the machinery in question (p. 108 of the Transcript). He also says that he was not paying very much attention to the matter, and the whole of his evidence shows that his recollection at the time of the trial was extremely vague (pp. 110, 111 and 112 of the Transcript).

The testimony of the defendant in error also showed that one or both of the assignees were notified of the claim of the defendant in error at the time of the sale in question. It is equally to be admitted that Mr. Cook, one of the assignees, and Mr. Meyer did not recollect being notified by Garrett and Bronson of the rights of defendant in error. But their recollections of the transaction in question were plainly, even confessedly, very vague (see

pp. 118, 119 and 120 of the Transcript). It is also to be noticed that both Mr. C. D. Latourette and Mr. D. C. Latourette, who are brothers, are attorneys and would therefore not be handicapped in acquiring and appreciating the evidence of the rights of the defendant in error in this case. They enter their appearance as solicitors in the Circuit Court of the United States (as shown p. 193 of the Transcript). Moreover, Mr. C. D. Latourette was the attorney for the assignees of the Lumber Company (p. 122 of the Transcript).

The Court below found that the defendant in error had never parted with its title to the machinery in question and awarded it judgment therefor or its value if it could not be delivered.

ARGUMENT.

The defendant in error contends:

I.

That the proposal, identified as plaintiff's Exhibit "A," was an agreement that the defendant in error would sell, and the Lumber Company would buy, the machinery in question upon a conditional sale contract.

(a) That this was the intention of the parties is established by what they said (evidence of Thomas S. Garrett, p. 38 of Transcript), and supplemented

by the very language of the exhibit itself, which conclusively shows on its face that *some* contract was to be entered into despite the contradiction of Mr. Bohn thereto. It was further supplemented by the action of the defendant in error in presenting such a contract for signature in due course.

(b) That the meaning of the agreement, as established by the uncontradicted testimony of Edward I. Garrett, by and under the decisions of the Supreme Court of Oregon, cannot now be assailed, *Aldrich vs. Columbia Southern Ry Co.* (Ore.), 64 Pac. 455.

II.

That whether or not the original agreement provided that the title should rest under a conditional sale contract, it is beyond controversy, plain that there was no intention of either of the parties that the title should pass at the time when Exhibit "A" was signed.

III.

That the rights of the defendant in error, in that respect, are equally good against the original vendeee and against its assignees in insolvency, and against the plaintiff in error, who attempted to purchase the property from the assignees as the representative of the bank holding the chattel mortgage, is supported by the cases here-

after cited, and we respectfully contend that the plaintiff in error not only was not a purchaser for value without notice, but that his rights would be no better if he were.

IV.

We further urge upon the court that the provisions of the statute of Oregon, requiring conditional sales contracts in certain cases to be recorded, which went into effect May 20, 1909, had no bearing upon the rights of the defendant in error, for the following reasons: (a) Said statute was not in effect when the agreement, Exhibit "A" was entered into.

(b) It was never possible for the defendant in error to file a conditional sale contract in the form provided by the statute, because it was impossible to procure the signature of the Lumber Company thereto.

(c) The machinery in question was not attached to the real estate so as to become a fixture thereto. It was not treated as such by any party. It was sold by the assignees to this very plaintiff in error as personal property. It was personal property by the agreement of every party who is shown to have dealt with it, and by its own nature and character.

Landigan vs. Meyer (Ore.), 51 Pac. 649;
Hinkel vs. Dillon (Ore.), 17 Pac. 148.

(d) There is no purchaser or mortgagee of

real property concerned in this transaction, and the Oregon statute, unlike the conditional sales statute of Washington and many other states, makes a conditional sale agreement void only as to *any purchaser or mortgagee of such real property.*

V.

Moreover, we further submit that nothing in the record in this case remotely indicates, much less establishes, any laches or waiver on the part of defendant in error of its claim to the property.

Reverting to the first proposition suggested in the argument, the defendant in error urges upon the court that the testimony of Thomas Garrett, wherein he states that he explained to Bohn of the Lumber Company that as part of the machinery sold must be made up specially it would have to be sold on a conditional sale contract whereby the vendor retained the title until it was paid for(Transcript pages 38 and 40), while it is met by the testimony of Mr. Bohn contradicting any such understanding on his part, is borne out by all of the facts and circumstances which are shown to have surrounded this transaction. In the first place, the contract itself, as has already been pointed out, recites that the transaction is to be covered by a machinery contract, and that a payment of $1500 is to be made in cash upon delivery; and the fact that this machinery must, as admitted by both parties, have been

delivered in installments, naturally presupposes that the payment would follow when it had been substantially delivered. Moreover, notes for the deferred payments were to be furnished at the same time, and these notes are coupled with the requirement with reference to a machinery contract.

The action of the defendant in error was directly in accordance with the interpretation which it has at all times put upon this original agreement. At the time when the machinery in question had been substantially delivered, a contract of conditional sale and notes as provided for in exhibit "A" were presented as a matter of course to the Lumber Company, with the request that they sign the same and make the cash payment. Now, are we confronted by the fact that the Lumber Company offered to pay the cash and sign the notes and repudiated the conditional sale agreement? Not at all. We are confronted by the fact that the Lumber Company repudiated the whole transaction. They neither paid the cash, nor signed the notes, nor executed the conditional sale contract. They did not offer to do any of these things. We think the reason is not far to seek, and that their action at this time simply foreshadowed the financial failure which soon followed. It may not be amiss to point out in passing that the Lumber Company exhibited its lack of a sense of fair dealing in claiming to be damaged in the sum of $3,000 for delay in shipping $5,700 worth of machinery, which must admittedly have

been delivered in installments over a considerable period of time, and which machinery, as Mr. Thos. Garrett said, had to be made up specially, and which was delivered between the 29th of April, and the 23rd of July, and the delays for which were attributed by the uncontradicted testimony of Mr. Garrett to the action of the Lumber Company in not furnishing the specifications which had to be provided before some of the machinery could be made (see Transcript pp. 48 and 53). Moreover the issue of this case was very plainly made up by the pleadings. The plaintiff in error was fully advised as to the exact contention which was going to be made in this case. Another man signed this exhibit "A." Surely, if Mr. Garrett is mistaken as to what was said when it was signed, the evidence of Mr. Collins, who also signed the agreement, would have been very persuasive if in support of Mr. Bohn. His testimony was not offered. Nor was his absence accounted for.

Supposing that it can be said that the weight of the evidence does not support the contention as to what the parties agreed should be the interpretation of the phrase "Machinery contract." Edward I. Garrett, a man of twenty-one years experience, and who qualified as an expert in the machinery business, testified that the phrase "Machinery contract," used in such connection, had a well established trade significance, and was synonymous with

the phrase "Conditional sale." Counsel for the plaintiff in error contends that this evidence will not avail the defendant in error, because of the provisions of Section 801 of Lord's Oregon Law to the effect that usage can be proved only by the testimony of at least two competent witnesses.

The transcript of the evidence, page 97, does not disclose that any objection of any kind, or at any time, was made to this evidence, although by an inadvertence an objection to its competency and materiality appears in the bill of exceptions. We think that counsel upon having attention called to this will not rely upon the exceptions in that respect. However, regardless of any objection made, and which was clearly not well taken at the time, and in the absence of any proper attempt to eliminate the testimony at the close of the evidence, we submit that the question is put entirely at rest by the case of *Aldrich vs. Columbia Southern R. R. Company,* 64 Pac. at p. 458, which case holds squarely against the contention of the plaintiff in error, even if an objectioin to the competency or the materiiality of the evidence was interposed when it was offered. Mr. Garrett was competent; and the evidence when offered, certainly was material. No objection of that kind could possibly reach the question as to whether, before the case was closed, sufficient evidence was introduced to defeat a challenge.

The Court, in the case above cited, says:

"Our statute provides that usage shall be proved by the testimony of at least two witnesses (Hill's Ann. Laws Ore., Sec. 778). The object of this section is to prescribe the quantum of evidence necessary to prove a particular fact. If it be considered that Jeffery's testimony was all that was introduced by plaintiff respecting the meaning which usage by railway contractors and engineers has ascribed to the words "straight cut and fill," when used in a contract for grading a railroad, the objection interposed to the testimony of the witness is insufficient to present the question now insisted upon; for, while the statute has designated the number of witnesses whose testimony is deemed sufficient to prove usage, a party may certainly dispense with the measure of proof so provided. If the court had been requested to withdraw Jeffery's testimony, or to instruct the jury to disregard it, and had refused to grant the request, an exception to its action would have reserved the question insisted upon, but, not having done so, no error was committed in the particulars complained of."

Irrespective of what the parties may say they meant and said, and of what, under any usage, the phrase "Machinery contract" means, the plaintiff in error is confronted with the incontrovertible fact that this contract, Exhibit "A," not only fails to disclose an intention to pass the title to the machinery, being wholly lacking in any words of transfer or conveyance, but it expressly provides that the transaction is not to be consummated until the conditions therein recited are performed. Three separrate concurrent acts were to be performed, to-wit, the payment of the cash, the

signing of the notes for the deferred payments and the execution of a machinery contract, be that what it may. In other words, we submit, as a proposition of law that on the face of the contract, this agreement, whether specific as to the performance of conditions precedent to the passing of title, or indefinite as to the exact terms thereof, was, at the time when entered into, and has at all times remained, a valid and binding agreement, and reserves the title to the machinery in question to the defendant in error, or, to put it in another form, the title did not pass because the instrument shows upon its face that the parties did not intend it to pass.

Such reservation may be either express or implied.

Johnson vs. Iankovitz (Ore.), 110 Pac., p. 399;
Lundberg vs. Kitsap County Bank (Wash), 139 Pac., p. 769.

The contract may be oral as well as written.

Blackwell vs. Walker, 5 Fed. 419;
Johnson vs. Iankovitz, supra.

Where the agreement is made under such terms and conditions that the title does not pass, but it is reserved to the vendor until the performance of such conditions, the latter may recover the property upon breach thereof, not only from the vendee himself, but from those who purchase of him, even though in good faith, without notice and for value.

Harkness vs. Russell, 118 U. S. 633, 30 L. Ed. 285;

Singer Manufacturing Co. vs. Graham, 8 Ore. 17;

Rosendorf vs. Baker, 8 Ore. 241;

Schneider vs. Lee, Ore. 17 Pac. 269;

Blackwell vs. Walker, 5 Fed. 419;

Johnson vs. Iankovitz (Ore.), 110 Pac. 399.

The Supreme Court of the United States, in the case of *Harkness vs. Russell, Supra,* very succinctly states the law as follows:

> "It is only necessary to add that there is nothing either in the statute or adjudged law of Idaho to prevent, in this case, the operation of the general rule, which we consider to be established by overwhelming authority; namely, that in the absence of fraud, an agreement for a conditional sale is good and valid, as well against third persons as against the parties to the transaction; and the further rule, that a bailee of personal property cannot convey the title, or subject it to execution for his own debts, until the condition on which the agreement to sell was made has been performed."

We do not think there is any substantial ground for the contention that the plaintiff in error was without sufficient and actual notice of the rights of the defendant in error in this case.

As has been pointed out in the statement of the facts, the plaintiff in error is simply the representa-

tive of the bank in Oregon City, which held the chattel mortgage upon the machinery in the Lumber Company's mill. The affairs of this bank appear from the record to be, so far as this transaction is concerned in any event, in the hands of two brothers, D. C. Latourette and C. D. Latourette. D. C. Latourette was attorney for the assignee in insolvency. They produced, at the trial of this case, the conditional sale agreement submitted to the Machinery Company on July 23, 1909 (Tr., p. 76), also the agreement with reference to a reorganization scheme, which the evidence shows was inclosed in a letter signed by the attorney for the defendant in error in which he set up the claim that the defendant in error was entitled to a conditional sale contract. The inference is compelling, and is not denied, that if they received the agreement they received the letter which accompanied it, and that they were familiar with defendant in error's request for signature to its form of contract (Def. Ex. 4; Tr., p. 142).

Regardless, however, of this inference, Edward I. Garrett and Ira Bronson testified positively to their having called upon D. C. Latourette at the bank in Oregon City on the morning when the sealed bid of the plaintiff in error was opened, which resulted in a sale either formal or informal to the plaintiff in error of the machinery in question, along with other machinery in the same mill. Their testimony is to the effect that they advised Mr. Latourette why they were there, and that they claimed a right

to this machinery by reason of their original contract of sale (Transcript pp. 57, 59, 60, 63, 65, 98, 99 and 100). Mr. D. C. Latourette evidently attached no very great importance to the defendant in error or to the parties who called on him, or to what they asserted their claim to be. Of course it is only fair to say that a number of years elapsed between the day of the sale and the trial of this case, but the sum and substance of his evidence was that he didn't recollect the parties having made the claim which they asserted that they made. Nor, for that matter, did he even remember that one of them had called on him. The evidence of the same witnesses is to the effect that they communicated the substance of their claim to one or both of the assignees who made the sale and to Mr. Meyer, the plaintiff in error. But Mr. Cook and Mr. Meyer were even more shadowy in their testimony than Mr. Latourette. They did not even remember having seen the witnesses although confessedly they were there. Mr. Cook, one of the assignees didn't even remember who made the sale or where his associate had his office (see Transcript pp. 107, 114, 117 and 121).

The plaintiff in error contends with seeming seriousness that the defendant in error must fail in this case because it's conditional sale agreement was not filed in the office of the Auditor of Klackimas County, Oregon, as it is contended it should have

been filed in compliance with Sec. 7414, Lord's Ore. Laws. The plaintiff in error has not, as required by the rules, set forth this provision of the statute. We quote portions of the section which we think are sufficient to illustrate the merit, or lack of merit, of the contention made by the plaintiff in error.

> "All conditional sales of personal property, or leases thereof containing a conditional right to purchase, where the property is thereafter *so attached to any real estate as to become a fixture thereto,* shall be void as to any purchaser or mortgagee of such *real property,* unless within ten days after said personal property is placed in and becomes attached to said real property a memorandum of such sale, stating its terms and conditions, together with a brief description of said personal property so as to identify it and signed by the vendor and vendee, with a notice indorsed thereon, or attached thereto signed by the vendor or his agent, describing such *real property,* shall be filed in the county clerk's office or county recorder's office of the county wherein such property and real estate is situated, and in case such memorandum is so filed as herein provided, the terms and conditions thereof shall be valid and binding on all parties, and shall be notice to any purchaser, incumbrancer or mortgagee of such *real property* of the right, title and interest of the vendor therein, and such property may be removed from said real estate by the vendor upon condition broken in said memorandum."

As we have indicated before, we think this provision has no bearing upon this case, because this statute confessedly did not go into effect until after the contract in question herein was entered into,

and for the further reason that the vendee made it impossible for the vendor to comply with the provisions of such a statute, and the plaintiff in error was aware of such fact. But, irrespective of the foregoing reasons, we urge our contention as unassailable upon the further ground that this machinery was not attached to any real estate as a fixture. All of the evidence was conclusive and without contradiction that it was simply bolted to its supports by bolts, the nuts of which were screwed off and on, and that it was attached in no other way. It was not intended by anybody to become a part of the realty or a fixture thereto. The plaintiff in error who held a chattel mortgage on it, and who sold it as personal property, and who said it was personal property, and that no real estate was sold, repudiates any such idea as would have to be involved if this were treated as a fixture to real estate. Mr. D. C. Latourette, as appears on page 109 of the transcript, was asked the question by counsel:

Q. And the whole property was sold together—land and building and machinery and all, was it?

A. No land. There was a lease. The building is on leased ground. The machinery is in a building that is on leased ground.

See

Landigan vs. Mayer (Ore.), 51 Pac. 649;
Henkel vs. Dillon (Ore.), 17 Pac. 148.

But the climax of the whole argument is reached when we read the provision of the statute in question to the effect that such conditional sale "*shall be void as to any purchaser or mortgagee of such real property,*" and the concluding portion of the paragraph which begins, referring to said notice, "and shall be notice to any purchaser, incumbrancer or mortgagee of such real property." We cannot believe that it will be seriously contended that a purchaser whose title is derived through a bill of sale and a chattel mortgage, is a purchaser, incumbrancer or mortgagee of real estate.

Plaintiff in error also contends that defendant in error has lost its rights as vendor upon a conditional sales agreement by waiver. This claim is based upon two circumstances: first, upon the language of the letter from Mr. Bronson to Mr. Bohn (Transcript pp. 67 and 68); second, upon the allegations of the bill in equity brought by defendant in error in the October term of the Circuit Court, 1911 (Transcript p. 179). The underlying thought of both arguments, however, is, apparently, that these circumstances are evidence that no conditional sale was originally contemplated, and that the present claim was an afterthought. This question of evidence upon the contract and the interpretation thereof we have already covered.

One of the most fundamental elements of waiver or estoppel, namely, that the act relied upon oper-

ated to the prejudice of the person seeking to invoke the principle, is wholly lacking. Reference to claim of lien in Mr. Bronson's letter, which, by the way, was not addressed to the plaintiff in error, was coupled with a statement of the facts, clearly showing that he claimed, on behalf of the defendant in error, the benefit of the agreement for a conditional sale. The expression upon which plaintiff in error relies was apparently used in a loose sense, as refering to a right in the property claimed by the defendant in error, and even if a technical construction and reliance is to be placed upon such expression, it is still wholly consistent with the position of the defendant in error, under the established doctrine of vendors' liens for the unpaid purchase price.

Likewise, in the case of the suit in equity, the facts were fully pleaded so that anyone interested was in no wise misled, but, on the contrary was fully apprised of the claim of the defendant in error. It claimed title to the machinery because of such facts, and if it wrongly designated its right as an equitable lien we cannot see with what justice plaintiff in error, after having sustained its objection upon an issue of law, based upon the facts pleaded, can say that the defendant in error is thereby precluded from asserting its proper remedy. That action was brought because the plaintiff, having the idea that the law required a contract to be in writing, and filed, deemed that it had no relief at law. A de-

murrer was sustained to its bill in equity upon the theory that if the real agreement was as plaintiff there contended, and now contends in this case, it had an adequate remedy at law, even without a written contract specifically reserving title. The facts alleged in that case are the facts that have been proved in this, and the ruling of the court there, that plaintiff had an adequate remedy at law, is logically followed in this case by the decision in its favor. We see nothing in that case inconsistent with the present position of the defendant in error upon the facts, nor does it contain anything to mislead the plaintiff in error to his prejudice so as to work an estoppel.

We can readily understand the anxiety of the plaintiff in error to prevent a hearing upon the issue upon the equity side of the court, but we are surprised that he should so far lose sight of the principles of common justice as to endeavor to hold, for the benefit of his principal, the bank, the property which was placed there after its security was acquired, in consideration of which it has extended no credit, and the title to which it has taken with notice of the claim of the defendant in error. This is the claim made on p. 33 of the brief of the plaintiff in error. It is claimed there were other creditors, but none, apparently who became such after this machinery was furnished, or in reliance upon it. It is claimed that the mill was a going concern, when, as a matter of fact, the mill was not in

operation before August but was just being constructed, and the Lumber Company though insolvent, continued to specify and receive machinery practically up to the time it made the assignment. No one was ever misled by any apparent ownership on the part of the mill company of this property, and to allow plaintiff in error to hold it now is simply to donate to it so much additional security upon its claim.

It is respectfully submitted that the judgment should be affirmed.

BRONSON, ROBINSON & JONES,
Attorneys for Defendant in Error.